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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEODORA OLIVAREZ,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the general jury verdict of guilty against a single defendant violates due process or the Sixth Amendment right to a jury trial under a substantive aid or abet count with "four conjunctive proscribed acts and theories" of criminal liability where a general verdict renders it impossible to say whether the defendant was convicted by the jury based unanimously on a proscribed act as to which the evidence was insufficient as a matter of law (anyone causing the bank to fail to file a CTR) or based unanimously on any one of the remaining three proscribed acts, even though the Government sought conviction during jury argument under all four theories, and the trial evidence can not constitutionally be viewed in the light most favorable to the jury verdict in resolving this issue.

LIST OF ALL PARTIES

At the United States Court of Appeals of the Fifth Circuit, the parties were: appellant-defendant Teodora Olivarez and appellee-plaintiff the United States of America.

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To The Honorable Supreme Court:

Teodora Olivarez, petitioner files this petition for certiorari.

OPINION BELOW

United States v. Olivarez, 940 F.2d 656 (CA5 No. 90-2826 7/25/91) (Table) is the unpublished opinion of which review is sought in this Court. That opinion is reproduced in the Appendix to this petition. See A3-12.[1]

JURISDICTIONAL STATEMENT

The opinion and judgment of the Fifth Circuit Court of Appeals sought to be reviewed were dated and entered July 25, 1991. Under 28 U.S.C. 1291, that Court of Appeals had jurisdiction over this case. On August 21, 1991, the Court of Appeals treated petitioner's timely filed

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[1] Appendix citations will be to its pages as "A____".

suggestion for rehearing en banc as a petition for panel rehearing and denied it. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1). Within the 89 day period following July 25, 1991, this petition was timely mailed for filing by the Clerk of this Supreme Court.

STATUTES INVOLVED

The Defendant was convicted of violation of 18 U.S.C. 2 and 31 U.S.C. 5324(1) or (3).

18 U.S.C. 2, Principals reads:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

31 U.S.C. 5324, Structuring transactions to evade reporting requirement prohibited, reads:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amendment V, and the constitutionally secured right to a jury trial under Amendment VI.

Amendment V (1791) reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791) reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall have been committed, which District shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case where the district court had jurisdiction under 18 U.S.C. 3231. On May 29, 1991, Petitioner Teodora Olivarez was charged in a one count indictment. It alleged that she had violated, either in her own right or as an aider and abettor, Title 31 U.S.C. 5324(1) and (3). The first theory of alleged criminal liability were the conjunctive allegations, inter alia, that Petitioner caused and attempted to cause the First National Bank of Rio Grande City of Texas ("the bank") to fail to file the currency transaction report ("CTR") required under 31 U.S.C. 5313(a).

The second theory of alleged criminal liability were the conjunctive allegations, that Petitioner caused and attempted to cause, structure, attempt to structure and assist in structuring a

transaction with "the bank" by exchanging $18,000 worth of $5.00 bills for $18,000 worth of $100.00 bills by structuring the transaction by dividing the exchange into two exchanges of $9,000 each.

On July 10, 1990, Petitioner was tried by a jury, which found her "guilty ... as charged in the indictment."

On September 11, 1990, the trial court imposed a sentence of imprisonment for twelve (12) months and one (1) day. Upon "Defendant's Motion for Release and Continuation of the Same Bail Pending Appeal, " the trial court granted the same on September 28, 1990, and so Petitioner has remained free under the conditions of her initial bond. However, on October 21, 1991, the trial court denied "Defendant's Verified Motion To Remain on Bail Pending United States Supreme Court's Action on Petition for Certiorari" and "Olivarez'

Supplemental Motion To Stay Execution of Sentence and Application for Release Pending Certiorari from a Judgment Affirming the Judgment of Conviction." Under the trial court's oral order of October 21, 1991, Petitioner is to voluntary surrender herself into custody by noon on November 4, 1991.

It is from that conviction, sentence and the affirmance of the United States Court of Appeals for the Fifth Circuit that Petitioner now seeks a Writ of Certiorari.

The Fifth Circuit Panel composed of Judges Politz, Davis and Barksdale, affirmed Petitioner's conviction effectively holding "it is almost certain" that the jury did not base its general verdict upon an insufficient theory (A9), after succintly summing up the evidence as follows (A4-5):

> "Accompanied by her mother Olivarez entered a bank and offered to pay a bank officer a commission on a monetary exchange if the bank would not file a Currency Transaction Report (CTR). The officer refused. Olivarez then went to a bank teller and exchanged $9,000 in five-dollar bills for an equivalent sum in hundred-dollar bills. Olivarez told the teller that her mother had nine thousand additional dollars to exchange. Olivarez's mother left the bank and returned with the cash. The teller explained to Olivarez that because the exchange was for more than $10,000 a CTR must be completed. Olivarez claimed not to have identification and insisted that the bank officer had condoned the transaction without a CTR. Olivarez placed the $18,000 in her purse. The bank filed a CTR for the transaction."

Petitioner at the Fifth Circuit argued in this case in her brief at pages 7-8 and 10-13 and citing Yates, Stromberg and Meriwether, also argued in her reply brief at pages 3-5, that the allegations in the indictment's single count go to various proscribed acts within two

entirely and distinct statutory theories of criminal liability. Petitioner asserted there in the Fifth Circuit that proof on the criminality theory that Petitioner structured or attempted to structure does not legally or factually here encompass proof of the criminality theory Petitioner caused or attempted to cause the bank not to file a CTR. There in the Fifth Circuit Petitioner asked two questions: "Which did the jury find? Who knows?" The Fifth Circuit noted (A9): "Government counsel claimed and witnesses testified to the jury without challenges that a CTR was filed. There was no evidence to the contrary." Thus, Petitioner asserted in the Fifth Circuit that due process was violated because the proof is legally insufficient as to the separate jury charged proscribed act that Petitioner caused the bank to fail to file

a CTR, and because it cannot be determined from the face of the general verdict whether guilt was based upon the proscribed acts of structuring or attempting to structure under section 5324(3) or the proscribed acts of causing or attempting to cause the bank to fail to file a CTR under section 5324(1).

Nevertheless, the Fifth Circuit held (A9): "In this case, it is almost certain that the jury did not find that Olivarez caused a failure to file a CTR."

The Fifth Circuit also held (A10): "A fair reading of the trial record does not reveal any cause for confusion. There is no suggestion that the verdict was not unanimous."

Petitioner submits the Fifth Circuit was not totally correct in stating (A10): "There is no suggestion that the verdict was not unanimous." There at page 4 of

her reply brief, Petitioner's appellate attorney had argued the altered unanimity issue as follows:

> In the case at bar, contrary to those that would admit of a single conceptual grouping, the Government's allegations go to acts within two entirely separate and distinct theories of criminal liability. Stated another way, proof of the theory that Appellant caused or attempted to cause the bank not to file a CTR, would not necessarily encompass proof of "structuring." Which did the jury find? Who knows?

The Fifth Circuit said (A6):

> Olivarez contends that her conviction is constitutionally infirm because there is insufficient evidence to support one of the possible offenses recited to the jury. The jury instruction included in its list of criminal offenses the act of causing a financial institution to fail to file a CTR. The bank did, however, file a CTR. Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment.

Petitioner submits the Fifth Circuit was incorrect in stating (A6): "Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment." There at page 7 of her brief, Petitioner's appellate counsel had candidly only stated to the Fifth Circuit:

> "Viewed in the light most favorable to the jury's verdict, the evidence was sufficient to sustain the jury's verdict as to a Subsec. (3) theory [i.e., carving up a single transaction into two less than $10,000.00 transactions].

However, at page 8 of her brief, Petitioner reminded the Fifth Circuit:

> Appellant never contested her factual guilt in the sense of taking the position that she did not engage in the conduct. Rather, her defensive testimony was that she owned half of the money and did not think that the two transactions would, could or should be considered as a single transaction that would require a report, especially since she had been given assurance otherwise from the bank officer, Mr. Moreno.

After the close of the evidence and the prosecutor's opening jury argument (A36-42), the district court at length inquired of the prosecutor since the court was unsure which theory was being relied upon by the Government (A42-55). In its entire jury argument, the Government ultimately expressly relied for conviction on all disjunctive theories [structuring or attempting to structure (A38, 41-42, 57, 60); aiding or abetting (A38); causing the bank to fail to file a CTR (A60); and attempt to cause the bank to fail to file a CTR (A41-42, 57, 60-61)] and each of the four proscribed acts of appellant as submitted in the disjunctive in the trial court's jury instructions (A18-23) along with an aid or abet instruction (A24-27).

Petitioner submits that from this case's two Jury Notes, the district court was put on notice of the jury's count one

problem of unanimously analyzing the guilt of Petitioner, who in effect testified she was not guilty, of a crime of "one or two bank tellers" (Criselda Sepulveda and Thelma Garcia) as the alleged structuring or attempted structuring crime under 31 U.S.C. 5324(3) as well as the same count's alleged crime under 31 U.S.C. 5324(1) of causing or attempting to cause the bank to fail to file a required CTR by attempting to bribe its employee Elmo Moreno and/or by misleading its employee Criselda Sepulveda as to instructions from Elmo Moreno that no CTR needed to be filed.

After the district court charged the jury, Petitioner's trial counsel renewed his prior objection to the phrasing of the different charges in the disjunctive rather than in the conjunctive as described in the indictment (A34, A42 to A55).

After the jury had been deliberating a while, the district court responded to Jury Note No. 1 by having read Petitioner's testimony that she made one transaction with one bank teller and her mother went to another bank teller (A63 to A69).

Then before the jury left for the day, the district court responded to Jury Note No. 2 where the jury had two questions (A69, 68-72):

> The first one, during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building, question mark.

The next day the jury deliberated more and then returned its guilty verdict where trial testimony had lasted no more than two hours (A69-70).

REASON FOR ALLOWANCE OF THE WRIT

Violation of Right to Due Process and Jury Trial

This Supreme Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Federal Courts of Appeal on the same matter.

This is a constitutionally confused area, which needs to be resolved by the Supreme Court deciding Petitioner's question presented. That question will not be resolved by the Supreme Court's forthcoming decision in Griffin v. United States, No. 90-6352, which was orally argued during the week of October 7, 1991.

Petitioner submits her judgment of conviction should be reversed because her conviction cannot be said to be based on a jury verdict which is clearly unanimous as

to any one proscribed act of Petitioner, since the Government argued for conviction as charged in the single count indictment brought under the four distinct acts of theories of criminality prohibited by 31 U.S.C. 5324(1) and (3). The chances are too high that three jurors voted guilty for structuring, and three jurors voted guilty for aiding and abetting through Petitioner's mother the caused or attempted structuring, while three more jurors voted guilty since Petitioner attempted to cause the bank to not file a CTR by bribery of bank officer Elmo Moreno, although the last three jurors voted guilty since Petitioner attempted to cause the bank to fail to file a CTR by refusing to identify herself or her mother to bank teller Criselda Sepulveda and/or by misleading Sepulveda, saying Moreno said that no CTR was due.

Observing that there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict, Justice Blackmun recently footnoted in his separate concurrence in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 1237 n. 5, 108 L.Ed.2d 369 (1990):

> There is one significant exception to this principle, but it does not support the dissent's position. In federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that "[u]nanimity ... means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." United States v. Ferris, 719 F.2d 1405, 1407 (CA9 1983). Accord, United States v. Duncan, 850 F.2d 1104, 1110-1115 (CA6 1988); United States v. Beros, 833 F.2d 455, 461 (CA3 1987); United States v. Schiff, 801 F.2d 108, 114 (1986), cert. denied, 480 U.S. 945, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987); United States v.

Gipson, 553 F.2d 453, 456-459 (CA5 1977). But see United States v. Bouquett, 820 F.2d 165, 169 (CA6 1987) (questioned in Duncan, 850 F.2d, at 1112-1113). This rule does not require that each bit of evidence be unanimously credited or entirely discarded, but it does require unanimous agreement as to the nature of the defendant's violation, not simply the fact that a violation has occurred. The North Carolina requirement that aggravating circumstances be found unanimously therefore has some analogue, albeit imperfect, in another area of the law. This principle is a protection for the defendant, however; its premise is that "[r]equiring the vote of twelve jurors to convict a defendant does little to ensure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d. at 458. There is no analogous principle requiring that jurors voting to acquit must agree upon the basis for their reasonable doubt.

In United States v. Echeverry, 719 F.2d 974, 975 (CA9 1983) (On Rehearing), the court denied the government's rehearing petition after reversal, saying:

> When it appears, however, that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts. Such circumstances are certainly present in this case. The jury's written questions indicated their confusion concerning multiple conspiracies and should have alerted the trial judge to the potential for a nonunanimous verdict. See United States v. Mastelotto, 717 F.2d 1238 (9th Cir.1983) (variance between the proof at trial and the indictment in a case involving multiple schemes to defraud presents such a potential for juror confusion that special unanimity instructions are required).
>
> The Petition for rehearing is denied.

In United States v. Meriwether, 440 F.2d 753, 757 (CA5 1971), a prosecution on a three count indictment charging willfully attempting to evade and defeat

defendant's and his wife's federal income tax for several years, the court reversed saying:

> There is no way to be certain upon which method of proof the jury based its verdict of guilty. On the next worth method the proof was insufficient as to the net worth of Mrs. Meriwether. The jury, if properly instructed, might well have failed to find any sufficient corroboration of Meriwether's cash on hand. In the light of the emphasis placed on net worth in the district attorney's argument and in the Court's charge, the jury may well have returned the verdict convicting Meriwether upon inadequate net worth proof and inadequate instructions. The judgment must therefore be reversed and the case remanded.
>
> Reversed and remanded.

In United States v. Duncan, 850 F.2d 1104, 1108-1115 (CA6 1988), a false statement tax case, the court reversed and remanded the cause after an exhaustive discussion on the trial court's sometimes duty to instruct the jury of the necessity

for a unanimous verdict as to any one part of a multipart count of an indictment or as to charged statutory alternatives when "'discrete acts are alleged in a single count, such as charges of separate false statements, any one of which is sufficient to convict.'" Id. at 1113. There, the court of appeals said, id. at 1105, 1114-1115:

> In this false statement tax case, defendant Duncan and defendant Downing, who was Duncan's tax preparer, were acquitted for the tax year 1981 and convicted for the year 1982 of violating 26 U.S.C. §§ 7206(1) and 7206(2), which prohibit the making and the preparation of a tax return containing a false statement as to a material matter. The 1982 tax return in question contained two separate and distinct statements which the indictment alleged were false. The structure of the indictment and ambiguous instructions given by the judge in response to a question from the jury combined to create a substantial likelihood of jury confusion, with the result that it is unclear which of the statements

the jurors found to be false and whether their verdict on either was unanimous.

*****

In the context of this case, the jury's request for clarification manifested just such a tangible risk of jury confusion and of nonunanimity on a necessary element of the offense charged. Presented with this risk, the trial judge unfortunately appears not to have appreciated the thrust of the jurors' problem. Instead, the judge merely restated his ruling on materiality and imparted the ambiguous advise that the jurors should convict "if you are convinced [that the] return was false with respect to either one of these matters." This instruction did not deter the jury from arriving at a composite verdict.

It seems obvious that the District Court's error in instruction was not harmless. This was a conscientious jury that had deliberated for parts of two days before it asked its questions, deliberated for several more hours after receiving the answers before pronouncing itself dead-locked, and then took several more hours into the next day before reaching its verdicts. The jury obviously wrestled with its

problems and returned with a discriminating verdict that acquitted on some counts and convicted on others. Although we do not look behind the verdict reached, surely there is a heightened risk in such circumstances of a composite, nonunanimous verdict. Where there is a reasonable possibility that a jury has relied on an "unconstitutional understanding of the law" in reaching a guilty verdict, that verdict must be set aside. Francis v. Franklin, 471 U.S. 307, 322 n. 8, 105 S.Ct. 1965, 1975 n. 8, 85 L.Ed.2d 344 (1985).

A question from a deliberating jury often represents a pivotal moment in a criminal trial. Particularly in a close case like this, a trial judge has a "duty of special care" when responding to a request for "further light on a vital issue" from the foreperson of a confused jury. As Justice Frankfurter said:

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.... When a jury

> makes explicit its difficulties a trial judge should clear them away with concrete accuracy.
>
> Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

In United States v. Beros, 833 F.2d 455 (CA3 1987), an appeal from conviction of "embezzling, stealing, abstracting or converting to his own use" funds of a particular union, the court of appeals reversed because by not acceding to defendant's request for specific instructions that to convict the jury must unanimously agree upon a particular act supporting defendant's guilt under a particular theory of criminality, the trial court committed reversible error since there is a significant possibility this error may have resulted in a non-unanimous verdict in violation of the Sixth Amendment. The court of appeals reasoned, saying, id. at 461-462:

In substance, the analytical problem presented by this case is whether the district court's use of the phrase "method, mode or manner" of violating the law provided sufficiently specific guidance to assure that, in fact, all members of the jury were unanimous on the same act or acts of illegality. Counts 3 and 5 each allege four separate and distinct theories of criminal activity: embezzlement, abstraction, stealing and conversion. Each count also enumerates several acts upon which a finding of guilty could be predicated. It is plainly not enough that the jury was unanimous in finding one theory on which it believed Beros culpable. The jury needed also to match that finding to another unanimous finding regarding a particular act.

The following hypothetical as to Count 3 may help to illustrate the problem we perceive. That Count alleged three separate transactions of Beros's criminal conduct: (1) the use of a Joint Council credit card to pay air fare for himself and his wife; (2) occupying a hotel suite that cost $160.00 per day rather than a single or double room which would cost no more than $60.00 per day; and (3) remaining in Florida for a couple of

additional days for personal reasons after the conclusion of the conference. We can easily imagine that only four jurors thought that the first act (the improper use of the Joint Council credit card) constituted criminal behavior, that four other jurors believed that act two (occupying a suite rather than a single room), constituted the criminal act, and that the final four jurors believed that the third act (Beros's remaining in Florida for personal reasons for a couple days after the conference) provided the basis for conviction. In this scenario, the jury would unanimously conclude that there was a mode or manner of violating the law, but there would be no unanimity as to the predicate act. Also, under such a scenario, any verdict would be defective because of the lack of real unanimity.

When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury. It cannot rely on a composite theory of guilt, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict.

> Conviction by a jury that was not unanimous as to the defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on the specific count. In this case, the permutations that can support a valid conviction are varied and several. What may not vary, however, is the required unanimity of each aspect of the jury's finding. We are convinced that the sixth amendment requires such unanimity, and we must be certain that the jury was properly instructed to achieve it. United States v. Peterson, 768 F.2d 64, 67 (2d Cir.), cert. denied, 474 U.S. 923, 106 S.Ct. 257, 88 L.Ed.2d 264 (1985). We conclude that the circumstances of this case, similar to those of Gipson, warranted more specific instructions regarding jury unanimity.

In United States v. Holley, 942 F.2d 916 (CA5 1991), a two count perjury prosecution, the court of appeals held the failure to give specific unanimity instruction was reversible error, denying the defendant the right to a unanimous jury verdict of guilt as to at least one

charged statement in each count of the indictment. There, where a single count as submitted to the jury embraced two or more separate offenses, though each be a violation of the same statute, the appeals court reversed and remanded, saying, id. at _____:

> The most reasonable interpretation of the court's instruction quoted above is that each juror was individually required to find at least one statement in each count to have been knowingly false in order to find Holley guilty. The instruction does not, however, require that all of the jurors concur in the knowing falsity of at least one particular statement. Holley specifically objected to the charge because it contained no such requirement. We conclude that there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count. The district court therefore erred in overruling Holley's objection and a new trial is required.

In United States v. Mangieri, 694 F.2d 1270, 1279-1282 (CA D.C. 1982), the

court affirmed after reviewing the issue, but being unable to conclude in viewing the jury instructions in the context of the whole trial that it was plain error not to give the more particularized jury instruction on the need for unanimity on the particular acts on which a guilty verdict is based.

In United States v. Busacca, 863 F.2d 433, 435-439 (CA6 1988), the court affirmed the conviction for embezzling money from the union finding no ambiguity as to the nature of the act -- the obtaining of the union contribution for Robinson's death benefits insurance -- given the trial court's specific unanimous instructions as to the theory the jury used to find the defendant guilty.

This issue needs further clarification from the Supreme Court. The issues as to acts which Petitioner raises

are distinguishable from that of culpable mental states resolved in Schad v. Arizona, 501 U.S. ___, 111 S.Ct. 2491, ___ L.Ed.2d ___ (1991), which held unanimity was not required on which of two bases for first degree murder, i.e. premeditated or during course of a felony. The Schad analysis rested on historical precedent as to what process was due in the context of a conviction on alternative theories of felony murder and premeditated murder. Schad is very limited to its facts where alternative means of murder satisfy the mental element of the single offense.

In Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 1869, 1870, 100 L.Ed.2d 384 (1988), the Court reversed a death sentence for and remanded the cause, saying in part:

> The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury

could have drawn from the instructions given by the trial judge and from the verdict form employed in this case. See Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985) ("The question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning"), citing Sandstrom v. Montana, 442 U.S. 510, 516-517, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979).

* * * * *

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

* * * * *

There is, of course, no extrinsic evidence of what the jury in this case actually

> thought. We have before us only the verdict form and the judge's instructions.
>
> * * * * *
>
> No one on this Court was a member of the jury that sentenced Ralph Mills, or of any similarly instructed jury in Maryland. We cannot say with any degree of confidence which interpretation Mills' jury adopted. But common sense and what little extrinsic evidence we possess suggest that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation, see Tr. of Oral Arg. 42, unless they are expressly instructed to do so.

In Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957), a prosecution for conspiring to advocate and teach the overthrow of the government by force and violence and to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, with intent of causing overthrow of government by force and

violence, the Court concluded that, because the general verdict made it impossible to determine which basis of the jury selected for its verdict, the judgment had to be set aside where the verdict was supportable on one ground, but not on the other since one arm of the conspiracy was barred by the statute of limitations. There the Court said, id. at 354 U.S. 311-312, 77 S.Ct. 1073 (footnotes omitted):

> The Government contends that even if the trial court was mistaken in its construction of the statute, the error was harmless because the conspiracy charged embraced both "advocacy" of violent overthrow and "organizing" the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives. Hence, the argument is, the jury must in any event be taken to have found petitioners guilty of conspiring to advocate, and the convictions are supportable on that basis alone. We cannot accept this proposition for a number of

reasons. The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement extending to both "advocacy" and "organizing" in order to convict. Further, in order to convict, the jury was required, as the court charged, to find an overt act which was "knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment," and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the "advocacy" rather than the "organizing" objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with "organizing" as with "advocacy." In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. Stromberg v. People of State of California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. State of North Carolina, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed. 279; Cramer v. United

States, 325 U.S. 1, 36, 65 S.Ct. 918, 935, note 45, 89 L.Ed. 1441.

> We conclude, therefore, that since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the "organizing" charge, and required the withdrawal of that part of the indictment from the jury's consideration. Samuel v. United States, 9 Cir., 169 F.2d 787, 798. See also Haupt v. United States, 330 U.S. 631, 641, note 1, 67 S.Ct. 874, 878, 91 L.Ed. 1145; Stromberg v. People of State of California, supra, 283 U.S. at page 368, 51 S.Ct. at page 535.

In Cramer v. United States, 325 U.S. 1, 36 n. 45, 65 S.Ct. 918, 935 n. 45, 89 L.Ed. 144 (1945), the Court reversed, holding that overt acts 1 and 2 were insufficient as proved to support the judgment of conviction of treason after noting at 45 in part:

> The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to

> identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279, 143 A.L.R. 1273.

In Stromberg v. California, 283 U.S. 359, 367-370, 51 S.Ct. 532, 535-536, 75 L.Ed. 1117 (1931), the Court reversed the conviction and remanded the case for further proceedings where one charged objective or statutorily proscribed purpose of the flag raising was unconstitutional under the First Amendment and the general verdict made it impossible to identify on which statutory ground the judgment rested where in the instructions to the jury the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the defendant should be

convicted if the flag was displayed for any one of the three purposes named. There the offense in the information, as to the purposes for which the red U.S. Communist Party's flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. There, the Court analyzed, saying, id. at 283 U.S. 367-368, 51 S.Ct. 535:

> We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon

> an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari.

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Respectfully submitted by
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